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No. 96-1452

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF COLORADO and VICTORIA BUCKLEY, in her official capacity as SECRETARY OF STATE,
Petitioners,
vs.
JENNIE SANCHEZ, ADELINE SANCHEZ and DEBRA CASANOVA,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The State of Colorado and Victoria Buckley, the Colorado Secretary of State (hereinafter "Colorado"), hereby submit their reply to the brief in opposition to the petition for writ of certiorari.

I. THIS CASE RAISES IMPORTANT LEGAL ISSUES

The Voting Rights Act is both controversial and complicated. The respondents characterize this case as one in which law is well-settled and uniformly applied throughout the circuits. It is difficult to support the respondents' conclusion when the Court itself has been deeply divided on the role of causation in cases alleging vote dilution,

Thornburg v. Gingles, 478 U.S. 30, 83, 99 (1986), and the role of race and ethnicity in the redistricting process in general. *See Bush v. Vera*, 116 S. Ct. 1941 (1996). This division is reflected in the divergent analyses among the circuits. *See* Petition for Writ of Certiorari, pp. 21-24.

The respondents argue that Colorado did not raise proportional representation as a defense in the Tenth Circuit. Colorado was not required to discuss proportional representation at the appellate court. Since nothing in the district court's decision required an analysis of the proportional representation issue, Colorado could only be expected to defend what was in the decision. Concern about proportional representation was triggered by the Tenth Circuit's decision.

Contrary to the respondents' conclusion, the Court has not had the opportunity to consider the application of the geographic compactness factor to a single-member district. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). It is Colorado's contention that, in applying the first prong of the *Gingles* test, the courts must consider traditional districting principles, such as contiguity, boundaries of political subdivisions within the district, the geographic bounds of the proposed district and preservation of communities of interest. Without due consideration of traditional districting principles, geographic compactness becomes a meaningless, amorphous concept in a statewide body consisting of single-member districts. The district lines can be drawn anywhere, in an effort to include or exclude groups which are large in number, but geographically dispersed. The respondents' "anything goes" definition of compactness will lead to a requirement of proportional representation. This issue, then, is one of first impression.

Colorado is asking the Court to reconcile its Voting Rights Act jurisprudence with its recent Fourteenth Amendment redistricting analysis. Balancing the mandates of the Voting Rights Act and the Equal Protection Clause "requires difficult exercises of judgment". *Bush v. Vera*, *supra*, at 1970 (O'Connor, J., concurring). While traditional districting principles are not enshrined in the Constitution, it is clear from this Court's recent decision that a state's failure to observe traditional districting principles constitutes a warning signal which precipitates further inquiry to determine whether districts are impermissible based on race. In this case, the respondents' proposed district, which would be the only Colorado district which would not be based on traditional districting principles, should not be deemed to satisfy the first *Gingles* prong.

The respondents argue that the unique geography of the region and the specific facts of this case make certiorari "problematic". This argument must be rejected. The facts of this case provide one of the clearest possible backdrops for consideration of the issues which have been raised. House District 60, as it is presently configured, joins a rural mountain valley, having a distinctive and historical community of interest, with two adjacent rural counties. The respondents' proposed district links a rural mountain valley with a distant urban area on the plains. The facts present an optimal context within which to discuss the interplay of geographic compactness and traditional districting principles.

The respondents consistently argue that the Tenth Circuit applied the proper legal standards. However, they offer only conclusory statements, without specific citations, to support their legal argument.[1] They utterly fail to address

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[1]The respondents' brief emphasizes the careful review of the (continued...)

Colorado's arguments about the legal standard and the effect of its application.

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[1](...continued)
evidence by the Tenth Circuit. The respondents' argument underlines Colorado's concern. The appellate court usurped the fact-finding function of the trial court and the Reapportionment Commission. If, as in this case, an appellate court finds that a legal standard has been applied improperly, then the appellate court must remand the case to the district court. Remand is particularly appropriate in matters in which the state is engaging in redistricting activities.

The Tenth Circuit's usurpation of the fact-finding functions of both the political process and of the trial court is particularly undemocratic. It emphasizes "expert reports," and substantially ignores the voices of citizens and their elected representatives. For example, while the respondents and the Tenth Circuit emphasize one unfortunate statement by Representative Entz, they dismiss the substantial body of work that he has performed for his Hispanic constituents, his support of the Hispanic candidates, and his cooperation with other Hispanic legislators.

Statistics, although helpful, do not provide a complete picture. The story cannot be understood without the testimony of the citizens. The Reapportionment Commission and the trial court, after hearing testimony from all segments of the community, reached the conclusion that Hispanics had a fair opportunity to participate in the political process. The Tenth Circuit, after hearing no testimony and listening to one-half hour of oral argument, reached the opposite conclusion. The Reapportionment Commission and the trial court should be given the benefit of any doubt which may exist about access to the political process in H.D. 60.

II. THE ISSUES IN THIS CASE ARE RIPE FOR REVIEW BY THE COURT

The respondents argue that review of the petition for writ of certiorari by this Court is premature because the remedial portion of the litigation is not yet decided. For the reasons stated below, the Court should reject this argument.

The certiorari jurisdiction of this Court is plenary in nature. *See Forsyth v. Hammond*, 166 U.S. 506, 511-13 (1897). The fact that a decision may not be final does not bar review of the case. R. Stern, E. Gressman, and S. Shapiro, Supreme Court Practice, § 2.2 (7th ed. 1993). The Court will review a decision which is not final if the issue is important and is "fundamental to the further conduct of the case". *United States v. General Motors*, 323 U.S. 373, 377 (1945) (Court accepted jurisdiction even though circuit court remanded); *see also Land v. Dollar*, 330 U.S. 731 n.2 (1947) (Court accepted jurisdiction, even though circuit court reversed dismissal and remanded).

The issues raised in this petition are fundamental to the outcome of the case. If Colorado's interpretation is correct, then a remand is unnecessary and Colorado can avoid the expense and hardship of redistricting.

Important issues of comity must be considered. This Court has continually recognized that "the States, although a union, maintain certain attributes of sovereignty". *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993) (States may appeal district court order denying a claim of Eleventh Amendment immunity under collateral order doctrine). The Court has recognized that "[t]he States have traditionally guarded their sovereign districting prerogatives jealously." *Bush v. Vera*, 116 S. Ct. at 1964. In deference to this traditional prerogative, the

Court has recognized that primary responsibility for redistricting must rest with Colorado, without undue interference from the federal courts. *Id.*; *Voinovich v. Quilter*, 507 U.S. at 156.

There can be little doubt that forcing Colorado to redistrict, when the underlying rationale for the redistricting effort is in question, constitutes undue interference. The failure of the Court to review prior to remand is disruptive to the political process. Potential candidates and electors will be uncertain about the boundaries of the house district, and Colorado will incur considerable expense. As a matter of comity, the Court should grant the petition.

This Court, recognizing the deference due states and their political subdivisions, has granted petitions for certiorari in circumstances similar to this case. *Holder v. Hall*, 512 U.S. 874 (1994). In *Holder*, citizens claimed that a county's single-member commission violated § 2 of the Voting Rights Act. The district court dismissed the claim. The Eleventh Circuit reversed and remanded. *Hall v. Holder*, 955 F.2d 1563, 1574 (11th Cir. 1992). The Court granted the petition for writ of certiorari prior to action by the district court on remand.

CONCLUSION

For the above-stated reasons, the petition for writ of certiorari should be granted.

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